

March 1934

## Discussion of Recent Decisions

Chicago-Kent Law Review

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Chicago-Kent Law Review, *Discussion of Recent Decisions*, 12 Chi.-Kent L. Rev. 139 (1934).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol12/iss2/3>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# CHICAGO-KENT REVIEW

Published December, March, June, and September, by the students of Chicago-Kent College of Law, 10 No. Franklin St., Chicago, Illinois.

Matriculated students are subscribers by virtue of the incidental fee charged them. Subscription price to others, \$1.50 per year. Single copies, 50c.

---

|                              |                     |
|------------------------------|---------------------|
| James R. Hemingway, '30..... | Editor              |
| Roger L. Severns, '32.....   | Assistant Editor    |
| G. W. Fearer.....            | Advertising Manager |

---

The section entitled "Discussion of Recent Decisions" in this issue is composed of essays written for the Callaghan Prize by the following students of the class of June, 1933: Walter T. Norlin and Maurice Benjamin Silberman.

---

The College assumes no responsibility for any statement appearing in the columns of the REVIEW.

---

Volume XII

March, 1934

Number 2

Copyright 1934, Chicago-Kent College of Law

---

## DISCUSSION OF RECENT DECISIONS

**RIGHT OF REMAINDERMAN IN PROCEEDS OF INSURANCE POLICY SECURED BY LIFE TENANT.**—A bill was filed in equity against Mamie Louise King and several insurance companies alleging that the complainant, Charles King, owned a fee in certain real and personal property as remainderman, and that the defendant, Mamie King, owned a life interest in the said property. The bill further alleged that Mamie King had insured the property for ten thousand dollars; that the property had been destroyed by fire which resulted in a loss equal to the amount of the policies; and that Mamie King was a trustee for the remainderman and should be required to hold the proceeds of the policy and be allowed only her life interest therein. The bill prayed that a trustee be appointed to administer the insurance fund and that Mamie King be allowed to rebuild, or that she be allowed interest on the fund during her lifetime, the fund to be held in trust for the benefit of the remainderman. A demurrer to the bill was sustained on the ground that there was no equity on the face of the bill, that it showed no duty on the part of the life tenant to insure for complainant's benefit. An appeal was prosecuted to the state supreme court where the decision of the trial court, sustaining the demurrer, was affirmed.<sup>1</sup>

<sup>1</sup> King v. King, 163 Miss. 584, 143 So. 422.

Briefly, the question before the court was this: What interest, if any, does a remainderman have in a policy of fire insurance placed by the life tenant upon property of which the life tenant was then in possession and which is subsequently destroyed by fire?

The theory upon which the remainderman's case was based was that there existed a trust relationship between the parties with the life tenant as trustee and himself as *cestui que trust*. He relied on four cases as authority for his position: *Sampson v. Grogan*,<sup>2</sup> *Green v. Green*,<sup>3</sup> *Welsh v. London Assurance Corporation*,<sup>4</sup> and *Clark v. Leverett*.<sup>5</sup> The Welsh case was a suit by life tenant against an insurance company; and though the opinion of the court contains language favorable to the remainderman, his rights were not before the court, hence the statements are mere obiter dicta.

The case of *Clark v. Leverett* reviews the other cases cited by the appellant. In the opinion in that case, the court classifies the cases under what it calls the Massachusetts, Rhode Island, and South Carolina rules. The Massachusetts rule is that the life tenant is not required to use the proceeds of the insurance on a total loss of buildings insured in his own interest in rebuilding on the premises, and he cannot be held accountable to the remainderman for such money, even if it amounts to more than the value of the life tenant's interest and is equal to the whole value of the property destroyed. The Rhode Island rule is said to be that if the policy of insurance covers merely the life tenant's interest, he is entitled to the insurance in full; but if amount is recovered by him, he is a trustee for the remainderman as to the excess of the amount received over the value of his life interest. The Rhode Island court in *Sampson v. Grogan* said, "If a policy is issued to a life tenant for the full value of the fee, and this amount is recovered by him, he certainly ought to be held to be a trustee for the remainderman as to the excess of the amount received over the value of his life interest." This expression is modified by the following statement of the court, "In the case at bar, however, the declaration does not allege that the policy covered anything more than the life tenant's interest in the building which was destroyed by fire." Whether the court actually lays down the rule attributed to it by *Clark v. Leverett* is immaterial for the purposes of this discussion. The language

<sup>2</sup> 21 R. I. 174, 42 A. 712, 44 L. R. A. 711.

<sup>3</sup> 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846.

<sup>4</sup> 151 Pa. 607, 25 A. 142, 31 Am. St. Rep. 786.

<sup>5</sup> 159 Ga. 487, 126 S. E. 258, 37 A. L. R. 180.

first quoted does, in any event, expose a possible doctrine midway between that of Massachusetts and of South Carolina, the next to be considered.

The third rule, designated the South Carolina rule, is laid down in the Green case relied on by the remainderman in the principal case. The South Carolina court holds that the funds collected on the policy stand in the place of the property destroyed and should therefore be used in rebuilding it, or should be held by the life tenant as a fund, the interest from which would be his during his life, the principal of which would go to the remainderman upon the tenant's death.

We have, then, three doctrines: First, that of Massachusetts, which holds that the life tenant may insure for the full value, and, after a recovery on the policy following a loss of the property, he need not account to the remainderman for any portion, even though the proceeds exceed the value of his interests. Second, that of Rhode Island, which holds that the amount in excess of the value of his interest must be kept in trust for the remainderman. Third, that of South Carolina, which holds that the entire proceeds take the place of the property and are held in trust for the remainderman with the income going to the life tenant until the natural termination of the life estate.

The exact question has not come up in many states, but where it has, the majority of the courts have held to the Massachusetts doctrine. In *Spalding v. Miller*,<sup>6</sup> a Kentucky case decided in 1898—although it was admitted that the life tenant had insured for, and recovered, more than the value of his interest—held there was no trust relationship, that the fund did not take the place of the property, and that the remainderman had no interest whatever in the money. The South Carolina cases were referred to and considered, but the court did not regard them as expressing sound law. Three years later this Kentucky case was approved in *Saunders v. Armstrong*.<sup>7</sup>

In *Brownell v. Board of Education*,<sup>8</sup> the Court of Appeals of New York decided that where the vendor of an executory contract for the sale of certain chattels insured them in his own name and for his own benefit, he was entitled to keep the proceeds of the insurance if a loss occurred before delivery and passing of title to the chattels. The suit was brought by the vendee of the contract, who was held to have no interest in the

<sup>6</sup> 103 Ky. 405, 45 S. W. 462.

<sup>7</sup> 22 Ky. L. 1789, 61 S. W. 700.

<sup>8</sup> 239 N. Y. 369, 146 N. E. 630.

money. The Supreme Court of New York, in a case on all fours with our principal case, held that the remainderman had no interest in the insurance money and could not make the life tenant use the funds to rebuild the house which had been destroyed.<sup>9</sup>

The Supreme Court of Oregon was called upon to decide the point in *Miller v. Gold Beach Packing Company*,<sup>10</sup> where the defendant was a lessee under a fifteen-year lease, containing a covenant that all buildings erected on the premises should be left there by the tenant and should become the property of the lessor at the termination of the lease. A building constructed and insured for its full value by the tenant was destroyed by fire, and a recovery was made on the policy. It was held that the covenant to leave the buildings on the premises did not extend to include rebuilding them in case of destruction by fire, and therefore the reversioner could not recover any part of the insurance money. The Oregon court cites the Brownell case in New York and approves its reasoning and its decree.

Virginia also is a state which can be said to support the Massachusetts, and majority, rule. In *Thompson v. Gearhart*,<sup>11</sup> the defendant had been in possession under a life estate for the life of another person and had insured the buildings in his own name. The party by whose lifetime the defendant's estate was limited, died, and thereafter a loss of the buildings occurred. The insured, of course, was not rightfully entitled to recover on the policy which was not in force after the termination of the life tenancy, but nevertheless, a judgment was recovered against the insurance company. The remainderman was allowed no share in the proceeds. The court rested its decision exclusively on the one ground that the contract of insurance was one of personal indemnity only and therefore the remainderman had no rights whatever, even though the loss occurred after the termination of the preceding particular estate and when the remainderman had the right of possession.

The Illinois Supreme Court has not had the issue between life tenant and remainderman before it for decision, but, in a suit by a life tenant against an insurance company, it has decided that the tenant could recover for the entire loss, even though that loss exceeded the value of the tenant's interest.<sup>12</sup> The Illinois Appellate Court had a case of remainderman against

<sup>9</sup> *Addis et al. v. Addis et al.*, 14 N. Y. S. 657.

<sup>10</sup> 131 Or. 302, 282 P. 764, 66 A. L. R. 858.

<sup>11</sup> 137 Va. 427, 119 S. E. 67, 35 A. L. R. 36.

<sup>12</sup> *The Andes Insurance Co. v. Henry Fish*, 71 Ill. 620.

life tenant in *Home Insurance Company v. Field*,<sup>13</sup> where an instruction had been given in the trial court that it was the duty of the life tenant to preserve the buildings on the property, so that the heir would not be deprived of the inheritance. The charge was held to be erroneous; and, the court, after stating that a widow's homestead was a life estate, said, "Nor do we understand that the law imposes upon a widow having an estate of homestead, the duty and obligation of preserving the buildings by insurance against fire, and of applying money received from such insurance to the rebuilding of the house, so that the heir shall not be deprived of the inheritance."

*Harrison v. Pepper*,<sup>14</sup> wherein the majority rule is laid down, has its foundation in two earlier cases in Massachusetts. In the first of these decisions, an attachment creditor obtained insurance on the attached property. A loss occurred, and it was held that the creditor was not bound to apply to his claim the amount of the insurance money he collected.<sup>15</sup> The second case was that of *Burlingame v. Goodspeed et al.*<sup>16</sup> Goodspeed, the agent of one Reed, a creditor of Burlingame, applied to the debtor for a trust deed as security for his principal's debt. The deed was given and Goodspeed, the agent, was named as trustee. Goodspeed, by virtue of the legal title vested in him, then insured the property, the policy insuring "H. C. Goodspeed, for account of whom it may concern; loss, if any, payable to him." An amount much in excess of the debt was collected on the policy, and the suit was brought by the debtor to have the debt paid out of the proceeds. The court found no duty on the trustee to insure for the mortgagor's benefit, and, therefore, the premium on the insurance was not a debt that the mortgagor could have been forced to pay, and hence he ought not in equity get the benefit of the insurance. These two cases form a firm basis of authority in Massachusetts for the rule in *Harrison v. Pepper*.

The so-called "Rhode Island rule" has no authority to support it, if in fact there is such a rule. As has been previously observed, the case of *Sampson v. Grogan* does not actually lay down the rule attributed to it by the Georgia court in *Clark v. Leverett*. The Rhode Island court expressed the opinion that the life tenant ought to be held as a trustee for the amount of the insurance money in excess of the value of his interest, but it also held that in the case before it there was no allegation that

<sup>13</sup> 42 Ill. App. 392.

<sup>14</sup> 166 Mass. 288, 44 N. E. 222, 33 L. R. A. 239, 55 Am. St. Rep. 404.

<sup>15</sup> *International Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239.

<sup>16</sup> 153 Mass. 24, 26 N. E. 232.

the money collected exceeded the value of the life tenant's interest and therefore dismissed the bill. An examination of other cases often supposed to have adopted this rule will also be found to fall short of supporting it. Thus, Michigan was at one time thought to adhere to this doctrine, by virtue of its decision in *Convis et al. v. Citizens' Mutual Fire Insurance Company of Calhoun County et al.*,<sup>17</sup> where the proceeds of the policy were divided by a court of equity between life tenant and remainderman, the former being allotted the amount equal to the value of his interest and the latter receiving the excess. But the facts were that the life tenant had expressly agreed to insure for both parties and the court was merely carrying into effect the agreement and making the tenant do what he had bound himself to do. A later decision in Michigan was cited as authority for the South Carolina doctrine in *Clark v. Leverett*, but again special circumstances distinguish the case, for there the relationship of guardian and ward existed between the remainderman and life tenant.<sup>18</sup> *Bennett v. Featherstone*,<sup>19</sup> a Tennessee case, is typical of those cases in which the life tenant insured only his life interest. The remainderman was held to have no interest. In the cases where the life tenant insures only his interest, it is not necessary for the court to inquire into the respective rights of life tenant and remainderman, because, until the life tenant's interest is satisfied, the remainderman has no rights.

The minority rule finds little support in authority. South Carolina appears to be the only state squarely committed to the doctrine that the life tenant must account for all of the insurance proceeds and that the money takes the place of the property destroyed. The root of the doctrine is found in *Smith v. Daniel*.<sup>20</sup> A bill had been filed to make the defendant life tenant give security for protection of the remainderman's interest in a slave. It was held that the facts did not warrant a decree compelling security to be given, although in a proper case such relief might well be granted. These words appear in the opinion, "A tenant for life is considered in the nature of a trustee for those in remainder." In the cases which follow *Smith v. Daniel*, this language has been made to say that the life tenant is a trustee for the remainderman, not that he is merely considered in the nature of a trustee; and, in the case mentioned as finally laying down the South Carolina rule, *Green v. Green*, it is held that the life tenant occupies the position of trustee and the remainderman that of *cestui que trust*.

<sup>17</sup> 127 Mich. 616, 86 N. W. 994.

<sup>18</sup> *Smith v. Cameron*, 158 Mich. 174, 122 N. W. 564.

<sup>19</sup> 110 Tenn. 27, 71 S. W. 589.

<sup>20</sup> 2 McCord's Ch. (S. C.) 143, 16 Am. Dec. 641.

*Clark v. Leverett* cannot strictly be said to follow the South Carolina doctrine, for there the relationship of guardian and ward existed, with the life tenant occupying the position of guardian of the remainderman, who was a minor, and by virtue of a statute in Georgia the guardian was a trustee for his ward. So, although the court claims to be following the *Green* case, these special circumstances made it unnecessary to declare that a trust existed from the naked relationship of life tenant and remainderman, as the South Carolina court expressly decides.

Having reviewed the authorities declaring and supporting the various doctrines and having found that where there is authority, it exists in favor of the Massachusetts rule, it remains to consider which of the doctrines has the best basis in reason and can therefore be upheld on principle.

Since we have here a question of insurance, it is necessary to call attention to the nature of fire insurance. A contract of fire insurance is one of indemnity which any person may effect on property where its destruction would result in loss to the person insuring.<sup>21</sup> It is a personal contract and cannot be transferred by the insured without the insurer's consent.<sup>22</sup> It does not run with the land<sup>23</sup> nor do the proceeds of the policy take the place of the property destroyed.<sup>24</sup> A person may not insure for more than the value of the property, but the parties may agree as to the value of the property, and in the absence of fraud, actual or presumptive,<sup>25</sup> the agreed value is binding.<sup>26</sup> Applying these principles to our case, we find the life tenant had a right to insure his own interest because he would have suffered a loss if the property was destroyed. We see also that the contract was personal to the life tenant, not to replace the property, but to indemnify him by the payment of a sum of money in the event

<sup>21</sup> *Berry v. American Century Insurance Co.* of St. Louis, 132 N. Y. 49, 30 N. E. 254; *The Andes Insurance Co. v. Henry Fish*, 71 Ill. 620; *Prussian National Insurance Co. v. Lawrence*, 221 Fed. 931, L. R. A. 1915 E. 489.

<sup>22</sup> *Kase v. Hartford Fire Insurance Co.*, 58 N. J. Law 34, 32 A. 1057; *William R. Vance*, *Handbook of the Law of Insurance*, (2d ed.) p. 70, and cases cited.

<sup>23</sup> *Carpenter v. The Providence Washington Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044.

<sup>24</sup> *Oldham's Trustee v. Boston Insurance Co.*, 189 Ky. 844, 226 S. W. 106, 16 A. L. R. 305.

<sup>25</sup> See *Lycoming Fire Insurance Co. v. Rubin*, 79 Ill. 402, where a jeweler took out a \$3,000 policy on goods worth not over \$1,500. The court held there was a sufficient presumption of fraud to avoid the policy. To the same effect is *American Insurance Co. v. Gilbert*, 27 Mich. 429.

<sup>26</sup> *Borden v. Hingham Mutual Fire Insurance Co.*, 35 Mass. 523, 29 Am. Dec. 614, and note 616; *Patapsco Insurance Co. v. Biscoe*, 7 Gill and J. (Md.) 212, 28 Am. Dec. 219; *Phoenix Insurance Co. v. McLoon*, 100 Mass. 475.



of loss. The effect of the ten thousand dollar valuation in the policy is to limit the liability of the insurance company in case the property was worth more than that amount and to make that valuation, unless fraudulently excessive, bind them in the event of a total destruction.

The existence of these principles and the weight of these conclusions was recognized by the insurance company in paying the full value of the policy. Thus far there is no difficulty. But what is their application to the relationship of life tenant and remainderman? As to the portion of the proceeds up to the value of the life tenant's interest there can be little said. It is clear that the life tenant is entitled to that portion and that the South Carolina rule is in effect a denial of the personal character of the insurance contract. A more difficult question is presented as to the amount in excess of the tenant's interest. The result of the Massachusetts rule that this excess also belongs to the tenant, is this: The life tenant, now having a sum of money which is equal to the full value of the property, could build a house of his own on land in which he would have not merely a life interest, but the fee title, in which the remainderman has no interest. It is this result that the South Carolina court has sought to avoid. The Rhode Island rule attempts to avoid this result and at the same time recognize the right of the tenant to the proceeds up to the value of his interest.

Viewed in the light of the insurance principles mentioned, the rule giving the entire proceeds to the tenant is not as harsh as it seems at first glance. The contract is personal and for the tenant's own benefit. The parties have agreed as to value and the premiums have been based on that valuation and have been paid by the life tenant out of his own pocket. We must keep in mind the fact that the money does not take the place of the property destroyed but is pure indemnity to the person taking out the insurance contract. The remainderman is a stranger to that contract.

This brings us to a consideration of the contract question. We have just said the remainderman is a stranger to the contract, but may he not have rights under the contract as a third-party beneficiary? It is elementary contract law that a third party has no rights under a contract unless made for his benefit.<sup>27</sup> The United States Supreme Court in discussing the suit on a contract by a third person has stated the law thus:<sup>28</sup> "What-

<sup>27</sup> *Crandall v. Payne*, 154 Ill. 627; *Parker v. Jeffery*, 26 Or. 186, 37 P. 712; *Searles v. City of Flora*, 225 Ill. 167.

<sup>28</sup> *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721.

ever may be the correct theory, one thing is essential to the right and that is that the third person be the real promisee—that the promise be made to him in fact although not in form. It is not enough that the contract may operate to his benefit. It must appear that the parties intend to recognize him as the primary party in interest and as privy to the promise.” An affirmative answer to the question would involve the making of some new contract law, unless it is presumed that the contract of insurance was made for the remainderman’s benefit. Such a presumption would be a pure fiction, since it must be clear that neither the life tenant nor the insurance company gave any thought to the remainderman when making the contract.

The minority rule disregards this contract ground by saying that without regard to the intention of the contracting parties, the life tenant owed a duty to the remainderman to insure for his benefit, arising out of their relationship, and that whether intended for the remainderman’s benefit or not, the contract will be so regarded. This leads us to a consideration of the relationship between life tenant and remainderman with respect to the duty of preservation of the property. What is the duty of the life tenant; is he bound absolutely to see that the property is preserved so that the remainderman may have the enjoyment of it?

In seeking a decision which compels the tenant to replace buildings destroyed during his tenancy by no fault of his own, we find that even South Carolina refuses so to hold in a case where the property had deteriorated from natural causes.<sup>29</sup> But, to be consistent, it must be said that where there is no duty to replace, there can be no duty to insure, because the South Carolina rule rests upon the proposition that the insurance money takes the place of the property destroyed.

Another approach is to inquire into the results of a failure to insure under the South Carolina doctrine. Again, to be consistent, the court would have to hold the tenant guilty of negligence for not insuring the property, since it is his duty to do so under the rule, and a breach of the duty would be actionable negligence if damage resulted. Such a state of the law would render covenants to insure meaningless and unnecessary, for the tenant would be bound to insure regardless of covenant and liable personally if he failed to do so. Because the life tenant would be bound to protect him a remainderman would always be foolish if he insured in his own interest.

<sup>29</sup> *Brooks v. Brooks*, 12 S. C. 422.

Again, looking at a failure of the tenant to insure as waste, we find the minority rule squarely opposed to well settled principles of law. In *Cannon v. Barry*,<sup>30</sup> in describing the conduct of a life tenant who had allowed a dwelling house to lose its value completely by decay, the court said, "He has been guilty of permissive waste in suffering the mansion to go to decay, but courts of equity take no jurisdiction of permissive waste by a life tenant. Their constant interference in such matters would render the enjoyment of the life estate impossible." It is apparent that the statement that it is the duty of the life tenant to insure for the remainderman has no basis in law and does not arise from the naked relationship between them.

One other ground for the minority rule has been urged in the South Carolina cases. It is said that it is against public policy to allow the tenant to insure for more than the value of his interest. We previously touched briefly on this question of overvaluation and called attention to the fact that where the insured and insurer agree as to value, the agreement, in the absence of fraud, is conclusive. This rule is itself based on consideration of public policy, that of not allowing an insurance company to avoid a policy after loss, where it previously agreed as to value. In any event, that question is one between the insurance company and the life tenant and has absolutely no force as to the remainderman.

The Massachusetts rule is without doubt the soundest of the three doctrines. While the result at which the other rules arrive may in one way be said to be equitable in that the remainderman does not lose anything by the destruction of the property, and in so far as the life tenant is given the use of the fund for life, and so is in as good a position as before the fire, nevertheless, the conclusion must be that the Mississippi court was on firm ground in following the Massachusetts rule and the weight of authority. The end does not justify the means, and to arrive at their result the South Carolina and Rhode Island courts, as we have observed, have disregarded many well-established legal principles of insurance, contracts, and real property law.

#### ANNULMENT OF MARRIAGE FOR FRAUD IN THE INDUCEMENT.—

May a court of equity annul a marriage upon the ground that there has been a breach of a contract, entered into before marriage, by which the wife promised the plaintiff sufficient money to carry on a certain business enterprise? The recent decision in the case of *Shonfeld v. Shonfeld*<sup>1</sup> concedes it that right.

<sup>30</sup> 59 Miss. 289.

Harry E. Shonfeld, the plaintiff, had been keeping company for some years prior to his marriage with the defendant, Bessie Shonfeld. Whenever marriage had been discussed by the defendant, the plaintiff had stated that he was in no position to marry because he could not make a living. When in May, 1930, the subject again arose, the defendant suggested that if it were only a matter of sufficient money to establish him in a business of his own, she could provide it. A month later six thousand dollars was needed to establish the plaintiff in a jewelry business. Defendant refused to furnish any money before marriage. In July of that year plaintiff and defendant contracted a civil marriage, after which the plaintiff requested the money promised him. When defendant refused, plaintiff discovered that she did not have it nor had even the means of getting it.

Plaintiff, claiming that the representations thus made were false, were believed and relied upon, and induced his consent to the marriage, then filed a bill to annul it. The trial court denied relief on the ground that the representations did not go to the essence of the marriage contract. The appellate division affirmed the trial court. The Court of Appeals by a four to three decision reversed that of the appellate division and decreed annulment of the marriage.

American courts have, in general, treated marriage as a contract so distinguished from other contracts that the fraud which would vitiate it would have to be of the kind that goes to the very essentials of the marriage relation—the rights and duties connected with cohabitation and consortium attached by law to the marital status. Using that as a standard, representations as to anything else not within its limits would be a representation as to an incidental characteristic of the relation and would not be material in affecting the status.

The origin of this view is found in England, where the jurisdiction of matrimonial cases was in the ecclesiastical courts. Governed by the Biblical injunction, the courts were chary of adding to causes which would be sufficient to sever the parties.

The fundamental of initial consent was recognized, however, and it was said by authority, "Persons cannot become husband and wife without their mutual consent. Consent is the very

<sup>1</sup> 260 N. Y. 477, 184 N. E. 60 (1933), reversing 258 N. Y. S. 338; commented upon in 32 Col. L. Rev. 1240; 2 Brooklyn L. Rev. 124-6; 46 Harv. L. Rev. 1034-5; 7 St. Johns L. Rev. 301-6; 28 Ill. L. Rev. 124-5; 1 U. of Chi. L. Rev. 128-32; 7 U. Cin. L. Rev. 338-40; 18 Corn. L. Quart. 97-101; 10 N. Y. U. L. Q. Rev. 247-8.

essence of the marriage contract; without it the marriage is null and void.'<sup>2</sup> Fraud in the execution of the agreement vitiated the consent and rendered the marriage contract a nullity. Fraud as to facts inducing consent was not alone sufficient. Where a question came up as to false representations of pedigree, Lord Stowell said, "A man who means to act upon such representations should verify them by his own inquiries; the law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced."<sup>3</sup>

The American authorities purported to follow the English,<sup>4</sup> but apparently took a step beyond the latter in holding fraud in the inducement as grounds for annulment if the fraud went to the essentials of the marriage. Massachusetts stated its position in the key case of *Reynolds v. Reynolds*.<sup>5</sup> "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial and furnishes no good cause for divorce. . . . These are accidental qualities which do not constitute the essential and material elements on which the marriage relation rests. . . . Nothing can then avoid it [the marriage] which does not amount to fraud in the *essentialia* of the marriage relation. Iowa, Delaware, Illinois, Ohio, South Carolina, Washington, and New York—before 1903, and in some cases, after—also followed the conservative theory. Thus, annulment was not permitted except in such cases as misrepresentations as to pregnancy,<sup>6</sup> venereal diseases,<sup>7</sup> and impotency or sterility.<sup>8</sup> Misrepresentations as to love,<sup>9</sup> intention not to assume the marriage relation,<sup>10</sup> physical condition,<sup>11</sup> disease other than

<sup>2</sup> 2 Kent's Comm. 76-77; Countess of Portsmouths case, 1 Hagg. Eccl. Rep. 355; Moot v. Moot, 37 Hun 288.

<sup>3</sup> Wakefield v. Mackay, 1 Hagg. Con. 394, 1 Phill. Eccl. 134n.

<sup>4</sup> For English view see Moss v. Moss, [1897] Prob. 263, 66 L. J. P. 154.

<sup>5</sup> 3 Allen (85 Mass.) 605 at page 607. For a discussion of the problem raised in this case see Fessenden, "Nullity of Marriage," 13 Harv. L. Rev. 110.

<sup>6</sup> Reynolds v. Reynolds, 85 Mass. 605.

<sup>7</sup> Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440; C. v. C., 158 Wis. 301, 148 N. W. 865, 5 A. L. R. 1013; Ryder v. Ryder, 66 Vt. 158, 28 A. 1029, 44 Am. St. Rep. 833.

<sup>8</sup> The Inhabitants of the Town of Gilford v. The Inhabitants of the Town of Oxford, 9 Conn. 321; Turney v. Avery, 92 N. J. Eq. 473, 113 A. 710. See 16 Col. L. Rev. 525.

<sup>9</sup> Griffin v. Griffin, 205 N. Y. S. 131.

<sup>10</sup> Bannon v. Bannon, 50 Wash. L. Rep. (Dist. of Col.) 22, 23 A. L. R. 178; Johnson v. Johnson, 257 Ill. App. 587.

<sup>11</sup> Kraus v. Kraus, 6 Ohio (N. P.) 248.

venereal,<sup>12</sup> chastity,<sup>13</sup> rank, wealth and fortune,<sup>14</sup> character,<sup>15</sup> name or past life,<sup>16</sup> have been held in jurisdictions following Massachusetts as insufficient cause.

Before 1903, New York stated its position in this fashion: "The rule is well settled that no fraud will avoid a marriage which does not go into the very essence of the contract and which is not in its nature such a thing as either would prevent the party from entering into the marriage relation, or, having entered into it, would preclude performance of the duties which the law imposes upon the husband and wife as a party to that contract."<sup>17</sup>

Ever since the equity courts in this country assumed jurisdiction exercised formerly by the church courts, the reformers have protested that the courts treated the marriage relation too lightly. Such is not true, however; the marriage status has been jealously protected and the courts, in invoking the power to sever the parties, have always considered that the fraud which may dissolve the marriage must be as to something vital. Parties to it take each other for better and for worse, and fraud in respect to character, fortune, health, and the like have been considered as not material enough to invalidate the marriage. Yet, concepts of marriage have changed with the times. "The *mores* determine what marriage shall be, who may enter into it, in what way they may enter it, divorce, and all the details of proper conduct in the family relation."<sup>18</sup> The importance to the marriage relation of character and health deserves to be considered, lest the doctrine which would deny annulment in cases of deception as to small details, usually termed "incidentals," be extended to greater considerations affecting the happiness of the relationship. Fairness has been demanded in dealings in this relationship as well as in other contracts, and the tendency has been to consider the marriage contract as one, which, by virtue of its duration

<sup>12</sup> *Lyon v. Lyon*, 230 Ill. 366, 13 L. R. A. (N. S.) 996.

<sup>13</sup> *Hedden v. Hedden*, 21 N. J. Eq. 61; *Leavitt v. Leavitt*, 13 Mich. 452; *Hull v. Hull*, 191 Ill. App. 307.

<sup>14</sup> *Williams v. Williams*, 32 Del. 39; *Allen's Appeal*, 99 Pa. St. 196, 44 Am. Rep. 101; *Woodward v. Heichelbech*, 97 N. J. Eq. 257, 128 A. 169.

<sup>15</sup> *Weir v. Still*, 31 Iowa 107.

<sup>16</sup> *Chipman v. Johnston*, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119, where the court said that false representations by a man to a woman as to his name, place of residence and situation in life made with a view fraudulently to procure her marriage to him, will not warrant the annulment of a marriage brought about by such representations. Case discussed in 19 Mich. L. Rev. 881-2.

<sup>17</sup> *Fisk v. Fisk*, 39 N. Y. S. 537 (1896).

<sup>18</sup> *Vanneman*, "Annulment of Marriage for Fraud," 9 Minn. L. Rev. 497.

and all-inclusiveness, should be attended in its inception with more than usual precautions.

This growth, however, has been slow and in keeping with the traditional policy of the law to change only as the times change permanently. The early cases in New York which have been cited by recent decisions and dicta declared that marriage was more than a contract, that it was more particularly a status, of which the marriage contract was merely the inception. But the trend of decisions in New York was declared to be codified in the Domestic Relations Law<sup>19</sup> upon which was based the decision in *Di Lorenzo v. Di Lorenzo*.<sup>20</sup>

In that case, the woman represented to the man with whom she had been having intercourse that he was the father of a child born to her while he was away from the state, and she exhibited to him a child when he returned. She had not given birth to any child, but had procured one for the purpose. It was decided that the woman had practiced a gross fraud in order to be married. The court held, under the statute, that such representations induced consent to a civil contract; such consent was therefore secured by fraud which vitiated the contract. The court said, "We rely upon the plain provisions of our statute and upon the application to the case of a contract of marriage of those salutary and fundamental rules which are applicable to contracts generally when determining their validity. If the plaintiff proves to the satisfaction of the court that through misrepresentations of some fact which was an essential element in the giving of his consent to the contract of marriage and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized and the court is empowered to annul the marriage."

The trend as to the degree of fraud is materially changed by this decision. Fraud, material to the degree that, had it not been practiced, the party deceived would not have consented to the marriage, and of such a nature as to deceive an ordinarily prudent person, is now considered adequate without further definition or limitation.

The New York courts have held that the following were material in each case and were grounds for annulment: misrepresentations as to tuberculosis<sup>21</sup> and epilepsy;<sup>22</sup> false statements

<sup>19</sup> Ch. 14 Paragraph 10 of N. Y. Cons. Laws ("marriage continues to be a civil contract").

<sup>20</sup> 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92 (1903).

<sup>21</sup> *Sobel v. Sobol*, 150 N. Y. S. 248.

<sup>22</sup> *McGill v. McGill*, 163 N. Y. S. 462. (Case reversed on newly discovered facts in 166 N. Y. S. 397 rather than on principle of law).

made by the defendant about non-essential things;<sup>23</sup> concealment of mental disorders in the family<sup>24</sup> and an intention never to assume marital relations;<sup>25</sup> misrepresentations as to use of drugs;<sup>26</sup> the offer to contribute money with intent to defraud,<sup>27</sup> a former marriage,<sup>28</sup> honesty,<sup>29</sup> intentions not to carry out marriage agreements,<sup>30</sup> misrepresentations as to chastity,<sup>31</sup> as to former marriage and annulment,<sup>32</sup> as to citizenship,<sup>33</sup> as to threats of revelations about former indiscretions,<sup>34</sup> and as to securing of religious ceremony after civil.<sup>35</sup>

In the instant case, the authority to annul a marriage in New York, while an equitable remedy in its nature, is purely statutory.<sup>36</sup> Marriage in New York represents merely a civil contract in its inception which later ripens into a status.<sup>37</sup> As a civil contract alone the essentials of marriage are consent and capacity to give it.<sup>38</sup> If either party consents through fraud, there is no reality of consent. Chancellor Sandford said in *Ferlat v. Gojon*<sup>39</sup> that in England the ecclesiastical courts had cognizance of matrimonial causes, but the jurisdiction of equity in cases of fraudulent contracts was sufficiently comprehensive to include

<sup>23</sup> *Libman v. Libman*, 169 N. Y. S. 900.

<sup>24</sup> *Smith v. Smith*, 184 N. Y. S. 134.

<sup>25</sup> *Moore v. Moore*, 157 N. Y. S. 819.

<sup>26</sup> *O'Connell v. O'Connell*, 194 N. Y. S. 265.

<sup>27</sup> *Robert v. Robert*, 150 N. Y. S. 366, where the complainant was induced to marry the defendant by his misrepresentation that they would put their money together and buy a hotel, and it appeared that the defendant had never any intention of carrying out his declared intention.

<sup>28</sup> *Minner v. Minner*, 238 N. Y. 529, 144 N. E. 781. (Dicta, the case going as to the status theory).

<sup>29</sup> *Sheridan v. Sheridan*, 186 N. Y. S. 470.

<sup>30</sup> *Moore v. Moore*, 157 N. Y. S. 819.

<sup>31</sup> *Domschke v. Domschke*, 122 N. Y. S. 892.

<sup>32</sup> *Weill v. Weill*, 172 N. Y. S. 589.

<sup>33</sup> *Truiano v. Truiano*, 201 N. Y. S. 573, discussed in 24 Col. L. Rev. 433, 8 Minn. L. Rev. 341, and 33 Yale L. Jour. 793.

<sup>34</sup> *Warren v. Warren*, 199 N. Y. S. 856.

<sup>35</sup> *Rubinson v. Rubinson*, 181 N. Y. S. 28.

<sup>36</sup> *Walter v. Walter*, 217 N. Y. 439, 111. N. E. 1081; *Bays v. Bays*, 174 N. Y. S. 212.

<sup>37</sup> *Lapides v. Lapides*, 254 N. Y. 76, 171 N. E. 911, which approves of the "status" theory.

<sup>38</sup> Ch. 14 Par. 10 N. Y. Cons. Laws; *Shonfeld v. Shonfeld*, 260 N. Y. 477, 184 N. E. 61.

<sup>39</sup> 1 Hopk. Ch. 478, 14 Am. Dec. 554.



the contract of marriage.<sup>40</sup> As equity refuses to define the fraud which will be necessary to invalidate a marriage, the courts have a free hand to decide each case as it appears. The fraud must be that which concerns giving consent to the marriage so that, but for the fraud, such consent would not have been given. This represents the background for the authority of the court, as set forth by the statutory interpretation which has been given.

Justice Crouch, with that as a basis, takes a further step and one over which the real controversy arises. He says, "The obligation of a husband to support a wife is no less lightly to be entered into than the other obligations of the marital relation . . . . The business which defendant's mythical money was to establish was plaintiff's only prospect of supporting her. It was a definite statement of an existing fact without which, as defendant clearly understood, no marriage was presently practicable."<sup>41</sup> As such misrepresentation was the inducement for the giving of the consent, a clear case is presented of fraud, material to a degree that, had it not been practiced, the party deceived would not have consented to the marriage.

While it is true that the courts have, as a general practice, followed the rule that the fraud which will be good ground for annulment must be as to something which goes to the essentials, it is impossible to define with any exactness the meaning of that term. Perhaps our understanding of the term will be determined by the degree to which we consider marriage as a sacrament on the one hand or purely a civil contract on the other. The recent tendency in some states seems to be away from the concept of marriage as a sacrament. It was said in *Gatto v. Gatto*:<sup>42</sup> "The public policy of this state, evidenced by the statutes, the decisions, or the general consensus of opinion, does not regard a fraudulent marriage ceremony as sacred and irrevocable by judicial action; it does not encourage the practice of fraud in such cases by investing a formal marriage, entered into in consequence of deceit, with all the force and validity of an honest marriage. While marriage is a contract attended with many important and peculiar features in which the state is interested, and while it is one of the fundamental elements of social welfare, its transcendent importance would seem to demand that wily and designing people should find it difficult successfully to perpetrate fraud and deceit as inducements to

<sup>40</sup> *Bays v. Bays*, 174 N. Y. S. 212; *Fisk v. Fisk*, 39 N. Y. S. 537.

<sup>41</sup> *Shonfeld v. Shonfeld*, 260 N. Y. 477, 184 N. E. 62.

<sup>42</sup> 79 N. H. 177, 106 A. 493.

the marriage relation, rather than that such base attempts should be regarded as of trivial importance and be wholly disregarded by the court."

The attitude of the courts on the question as to the sufficiency of the fraud necessary to annul a marriage can be divided into three groups: first, English decisions, the oldest and closest akin to the religious views of the jurists, forming the strict doctrine; second, those American decisions following the English rule, as typified by Massachusetts; and, third, the modern liberal rule as presented in the New York decisions.

No doubt the decision in the Shonfeld case will be discussed by many as an example of the definition of an appellate court as that which reviews the errors of a lower tribunal in order to perpetuate its own. Yet, the opinion is a natural step in the development of the contractual theory of marriage in New York and other states. It is clear that the New York courts are only following the tendency of that state as expressed in the Domestic Relations Law. To consider this case apart from the statute is impossible, and so the contractual theory must be firmly anchored to it. It is said that the intention of the legislature must be read into every statute. Can there be any doubt in view of the decisions that the statute has been followed?

It is true that one criticism, that which is raised to any liberal theory, will be raised to the New York theory. The followers of the old rule will still say "Man proposes, but God disposes" to this idea, and will wait in resignation for the licentious and irregular social relationships which, they claim, will result from allowing the marital ties to be so easily severed. However, it is perhaps better to put marriage on a healthier basis in its inception and consider it as a contract to which the parties owe equal obligations, than to maintain it in a rarified atmosphere of sentiment which, after all, lasts but to the door of the divorce court.